

UNITED STATES TAX COURT
WASHINGTON, DC 20217

TZIPPORA C. WEISINGER,)	
)	
Petitioner,)	
)	
v.)	Docket No. 15555-11S.
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent)	

ORDER OF DISMISSAL AND DECISION

When this case was called from the calendar of the Court's Westbury, New York Trial Session on February 11, 2013, in New York, New York, there was no appearance by or on behalf of petitioner. Counsel for respondent appeared and filed a Motion to Dismiss for Lack of Prosecution. The Court, by Order to Show Cause served on the parties March 12, 2013, ordered petitioner, on or before April 8, 2013, to show cause why respondent's motion should not be granted and ordered respondent to file a memorandum of law addressing whether the determination of penalties under section 6662(a)¹ should be sustained in this case, in view of an issue concerning how refundable credits affect the computation of an underpayment of tax. The Order to Show Cause was served on petitioner by mail at the address listed on the petition and was not returned. To date, petitioner has not responded to the Order to Show Cause. Respondent filed his Memorandum of Law on April 8, 2013.

The Court may dismiss a case at any time and enter a decision against the taxpayer for failure to properly prosecute his or her case, failure to comply with the Rules of this Court or any order of the Court, or for any cause which the Court deems sufficient. Rule 123(b); Edelson v. Commissioner, 829 F.2d 828, 831 (9th

¹Rule references are to the Tax Court Rules of Practice and Procedure and section references are to the Internal Revenue Code of 1986, as in effect for the years at issue.

Cir. 1983); Tipton v. Commissioner, 127 T.C. 214, 217 (2006). The Court may also dismiss a case for lack of prosecution if the taxpayer inexcusably fails to appear at trial and does not otherwise participate in the resolution of his or her claim. Rule 149(a); Tipton v. Commissioner, 127 T.C. at 217; Brooks v. Commissioner, 82 T.C. 413 (1984), aff'd without published opinion, 772 F.2d 910 (9th Cir. 1985).

Petitioner has failed to properly prosecute this case. On September 7, 2012, the Court's Notice Setting Case for Trial, scheduling a trial in this case for February 11, 2013, and Standing Pretrial Notice were served on petitioner by mail at the address provided in the petition. This mailing was not returned. Petitioner failed to appear for trial on February 11, 2013, in violation of both notices, which advised petitioner that she was expected to be present on the trial date and prepared to try the case, and likewise warned that her failure to appear for trial could result in dismissal of the case and entry of a decision against her. Accordingly, we conclude that it is appropriate to dismiss petitioner's case for lack of prosecution.

In the notice of deficiency, respondent determined deficiencies of \$5,124 and \$5,356 in petitioner's Federal income tax for taxable years 2008 and 2009, respectively. All of the material allegations set forth in the petition in support of the assignments of error have been denied in respondent's answer. Petitioner has not claimed or shown entitlement to any shift in the burden of proof under section 7491(a). Accordingly, the burden of proof rests with petitioner concerning any error in the determination of the deficiencies, and petitioner has adduced no evidence in support of the assignments of error in the petition. We therefore sustain the deficiencies determined by respondent.

In the notice of deficiency, respondent also determined for 2008 an addition to tax under section 6651(a)(1) of \$283.95 and an accuracy-related penalty under section 6662(a) of \$1,024.80; and for 2009 an accuracy-related penalty under section 6662(a) of \$1,071.20.

Pursuant to section 7491(c), the burden of production is on respondent with respect to an addition to tax determined under section 6651(a)(1). See Higbee v. Commissioner, 116 T.C. 438, 446 (2001). To meet his burden, respondent has proffered a transcript of account for petitioner's 2008 taxable year. The transcript indicates that petitioner filed her Federal income tax return for 2008 on July 27, 2009. Absent an extension, a tax return made on the basis of the calendar year must be filed on or before the 15th day of April following the close of the calendar year. Sec. 6072(a). Accordingly, respondent has met his burden of production

with respect to the addition to tax under section 6651(a)(1). Petitioner bears the burden of proof with respect to any exculpatory factors and has adduced no evidence in support of such exculpatory factors. See Higbee v. Commissioner, *supra* at 446-447; see also Wheeler v. Commissioner, 127 T.C. 200, 206 (2006). Consequently, we will sustain respondent's determination of a section 6651(a) addition to tax for 2008.

Section 6662 imposes a penalty equal to 20 percent of any underpayment of tax attributable to negligence or a substantial understatement of income tax. Secs. 6662(a), (b)(1), (b)(2). Pursuant to section 7491(c), respondent also bears the burden of production with respect to accuracy-related penalties determined under section 6662(a). See Higbee v. Commissioner, *supra*. An underpayment of tax for this purpose is defined as the excess of the amount of income tax imposed over the sum of the "amount of tax shown as the tax by the taxpayer on his return" and any tax previously assessed (or collected without assessment), less any rebates.² Sec. 6664(a); sec. 1.6664-2(a), Income Tax Regs. An understatement of tax is defined as the excess of "the amount of tax required to be shown on the return" over "the amount of the tax imposed which is shown on the return", less any rebates. Sec. 6662(d); sec. 1.6662-4(b)(2)-(5), Income Tax Regs. An understatement is "substantial" if it exceeds the greater of 10% of the tax required to be shown on the return or \$5,000.

For purposes of determining whether an underpayment exists, the amount of income tax imposed is the amount of tax imposed under subtitle A for the taxable year less certain credits and payments not relevant here. Sec. 1.6664-2(b), Income Tax Regs. Also for this purpose, the "amount of tax shown as the tax by the taxpayer on his return" is reduced by refundable credits claimed, including section 32 (earned income) credits, but not below zero. See Rand v. Commissioner, 141 T.C. ___, ___ (slip op. at 33) (Nov. 18, 2013).

For 2008, we have sustained the adjustments in the notice of deficiency that determined a total tax liability of \$2,246 and an allowable section 6428 credit of \$353. Thus the amount of income tax imposed for 2008 is \$1,893. The tax shown on petitioner's return for 2008 is reduced from \$1,893 to \$0 by the disallowed

²Respondent represents and petitioner has not disputed that: (1) petitioner received no rebates within the meaning of section 1.6664-2(a), Income Tax Regs., for 2008 and 2009, see sec. 1.6664-2(d), Income Tax Regs., and (2) petitioner had no tax previously assessed or collected without assessment for 2008 and 2009.

section 32 credit of \$4,824. Petitioner's underpayment and understatement for 2008 are thus \$1,893.³

For 2009, we have sustained the adjustments in the notice of deficiency that determined a total tax liability of \$2,250 and an allowable section 36A credit of \$400. Thus the amount of income tax imposed for 2009 is \$1,850. The tax shown on petitioner's return for 2009 is reduced from \$1,850 to \$0 by the disallowed section 32 credit of \$5,028. Petitioner's underpayment and understatement for 2009 are thus \$1,850.⁴

In his Memorandum of Law, respondent contends that petitioner is liable for section 6662(a) accuracy-related penalties because her underpayments of tax for 2008 and 2009 are attributable to substantial understatements of tax. However, as petitioner's understatements of income tax for 2008 and 2009 do not exceed \$5,000, neither is a substantial understatement within the meaning of section 6662.

Respondent determined, however, that petitioner's underpayments for 2008 and 2009 were also attributable to negligence or disregard of rules or regulations. See sec. 6662(b)(1). Negligence includes any failure to make a reasonable attempt to comply with the internal revenue laws. Sec. 6662(c). It connotes a lack of due care or a failure to do what a reasonable and prudent person would do under the circumstances. Bunney v. Commissioner, 114 T.C. 259, 266 (2000). This includes any failure by the taxpayer to keep adequate books and records or to substantiate items properly. Sec. 1.6662-3(b)(1), Income Tax Regs. Disregard is defined as careless, reckless, or intentional disregard of rules or regulations. Sec. 6662(c).

In both his Motion to Dismiss for Lack of Prosecution and his Memorandum of Law filed April 8, 2013, respondent alleges that petitioner failed to produce any evidence to support the positions she took on her 2008 and 2009 returns. Petitioner

³In his Memorandum of Law addressing the penalties at issue in this case, filed April 8, 2013, respondent contends that the underpayment for 2008 is \$5,124. For the reasons outlined in Rand v. Commissioner, supra, we reject respondent's computation of the underpayment.

⁴In his Memorandum of Law addressing the penalties at issue in this case, filed April 8, 2013, respondent contends that the underpayment for 2009 is \$5,356. For the reasons outlined in Rand v. Commissioner, supra, we reject respondent's computation of the underpayment.

has been afforded ample opportunity to respond to respondent's allegations; indeed, she has disregarded the Order to Show Cause directing her to do so. Consequently, we treat respondent's allegations as established.

Petitioner failed to ensure the accuracy of her return, and failed to properly substantiate her head of household filing status, dependency exemptions, and earned income credits claimed on her 2008 and 2009 returns. We therefore conclude that respondent has met his burden of production to show that the underpayments for 2008 and 2009 are attributable to negligence or disregard of rules or regulations. Petitioner bears the burden of proof with respect to any exculpatory factors and has adduced no evidence in support of such exculpatory factors. See Higbee v. Commissioner, *supra* at 446-447; see also Wheeler v. Commissioner, *supra* at 206. Consequently, we will sustain respondent's determination of accuracy-related penalties for 2008 and 2009 under section 6662 for underpayments (as calculated herein) attributable to negligence or disregard of rules or regulations.

On the basis of the foregoing, it is

ORDERED that the Court's Order to Show Cause dated March 7, 2013, is hereby made absolute. It is further

ORDERED that respondent's Motion to Dismiss for Lack of Prosecution is granted and this case is herewith dismissed for lack of prosecution. It is further

ORDERED AND DECIDED that there is a deficiency of \$5,124, an addition to tax under section 6651(a)(1) of \$283.95, and an accuracy-related penalty under section 6662(a) and (b)(1) of \$378.60 with regard to petitioner's Federal income tax for taxable year 2008 and that there is a deficiency of \$5,356 and an accuracy-related penalty under section 6662(a) and (b)(1) of \$370 with regard to petitioner's Federal income tax for taxable year 2009.

(Signed) Joseph H. Gale
Judge

ENTERED: **NOV 22 2013**